

# ATTACHMENT 16

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**UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
**SAN FRANCISCO DIVISION**

IN RE: DA VINCI SURGICAL  
ROBOT ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

Case No.: 3:21-cv- 03825-AMO-LB

**DEFENDANT INTUITIVE SURGICAL,  
INC.'S OPPOSITION TO HOSPITAL  
PLAINTIFFS' ADMINISTRATIVE MOTION  
FOR LEAVE TO FILE RESPONSE TO  
DEFENDANT INTUITIVE SURGICAL,  
INC.'S OBJECTION TO CERTAIN CLASS  
CERTIFICATION REPLY EVIDENCE**

Judge: The Honorable Araceli Martínez-Olguín

Pursuant to Civil Local Rule 7-11(b), Defendant Intuitive Surgical, Inc. (“Intuitive”) hereby opposes Hospital Plaintiffs’ Administrative Motion For Leave To File Response To Defendant Intuitive Surgical, Inc.’s Objection To Certain Class Certification Reply Evidence (ECF No. 301) (the “Motion”). The Court should deny the motion for four reasons.

*First*, Local Rule 7-3(d)(1) does not permit or otherwise contemplate a response to an objection filed pursuant to that rule. *See Stardock Sys., Inc. v. Reiche*, 2018 WL 7348858 at \*6 (N.D. Cal. Dec. 27, 2018) (“Responses to evidentiary objections are not contemplated in the local rules. *See* Civ. L.R. 7-3.”); *see also Coal. on Homelessness v. City & Cnty. of San Francisco*, 2024 WL 3669475 at \*3 n.4 (N.D. Cal. Aug. 5, 2024) (“Other than Defendants’ objections to Plaintiffs’ reply evidence, which are authorized by the local rules, these unauthorized filings waste judicial resources and unnecessarily multiply the proceedings.”). The Court should deny the Motion on that ground alone.

*Second*, Intuitive’s Objection (ECF No. 298) does not violate the prohibition against including argument on the underlying motion in a Local Rule 7-3(d)(1) evidentiary objection. Intuitive limited its four-page Objection to only that material necessary to explain the grounds for its objections to Prof. Elhauge’s two new opinions and the Declaration of Mark Early (“Early Declaration”), including why Plaintiffs’ reliance on such evidence in its class certification reply papers was improper. Thus, for example, Intuitive did not argue or otherwise explain how the challenged evidence (or the striking of it) would or should impact the class certification motion.

*Third*, Plaintiffs’ Response itself demonstrates that the two new opinions Intuitive challenges were not in Professor Elhauge’s opening class certification report. Plaintiffs do not point to any part of his report in which Prof. Elhauge opined that Intuitive would have had “less market power” over robots in the but-for world. Instead, Plaintiffs cite parts of his report in which Prof. Elhauge points to empirical evidence from the actual world that he claims shows a decline in EndoWrist prices associated with a decline in robot prices. *See* ECF No. 301.1 at 2 (citing ECF No. 296.2 (Elhauge Corrected Class Cert. Report dated July 13, 2024), ¶¶ 643, 681, 830, 846, 934-35). However, that observation is not on its own terms, or even by implication, an *opinion* about Intuitive’s level of market power over robots in the

1 but-for world, and Prof. Elhauge did not connect his observation to any opinion in that report about  
2 Intuitive's market power over robots in the but-for world.

3 Plaintiffs' reference to a paragraph of Prof. Elhauge's opening report positing that service is a  
4 "partial substitute" for a new da Vinci purchase, ECF No. 301.1 at 1 (citing ECF No. 296.2 (Elhauge  
5 Corrected Class Cert. Report dated July 13, 2024), ¶ 680), is even more attenuated. Prof. Elhauge does  
6 not opine in that paragraph that Intuitive would have less market power over robots in the but-for world  
7 because of his view of service as a "partial substitute" for a new robot. Nor does Plaintiffs' reliance on  
8 Prof. Elhauge's deposition save them. It is black-letter law that opinions of an expert must be disclosed  
9 in a written expert report served pursuant to Fed. R. Civ. P. 26. In any event, Prof. Elhauge did not offer  
10 an opinion at his deposition that Intuitive would have "less market power" over robots in his but-for  
11 world, but instead testified that Intuitive would have "monopoly power" (the ultimate in market power).  
12 See ECF No. 288.21 (Elhauge Dep. Tr.) at 41:12-42:4 (filed under seal at ECF No. 289.14). And he did  
13 not testify in his deposition about quantifying damages arising from sales of robots in the but-for world.  
14 Plaintiffs openly concede the omission of that subject from Prof. Elhauge's opening class certification  
15 report. See ECF No. 301.1 at 2.

16 Finally, Plaintiffs are wrong that the Early Declaration "appropriately counters" the declaration  
17 of Intuitive's controller, Fredrik Widman. ECF No. 301 at 4. Mr. Widman did not offer anywhere in his  
18 one-page, three-paragraph authenticating declaration his subjective understanding of the settlement. See  
19 ECF No. 288.2 (filed under seal at ECF No. 289.3). To be sure, his declaration quoted the release  
20 language, but he did not go further and give a view on whether Larkin's antitrust claims were released  
21 by it. *Id.* ¶ 3.<sup>1</sup>

## 22 CONCLUSION

23 For these reasons, Intuitive respectfully requests that the Court deny the Motion.

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24 <sup>1</sup> The suggestion that Intuitive "sandbagged" Plaintiffs (ECF No. 301.1 at 5 n.2) is demonstrably wrong.  
25 The settlement was with a named plaintiff. Plaintiffs do not (and cannot) dispute that Larkin had  
26 counsel who was copied on the emails through which the settlement was negotiated. Intuitive has no  
27 obligation to make sure Plaintiffs' counsel in this matter is aware of their client's activities. And the  
28 settlement happened in February 2024 (see ECF No. 288.3), long after the pleadings and discovery  
closed.

Dated: October 28, 2024

By: /s/ Andrew Lazerow

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